

CASE NO. DA 09-0632

IN THE SUPREME COURT OF THE STATE OF MONTANA

DEREK STEBNER and STEBNER REAL ESTATE, INC.,
a Washington Corporation,

Appellants,

-VS.-

ASSOCIATED MATERIALS, INC. (AMI) d/b/a ALSIDE,

Appellee.

On Appeal from the Montana Fourth Judicial District,
Missoula County, The Honorable Ed McLean Presiding,
Missoula County District Court Cause No. DV-05-571

APPELLEE'S BRIEF

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Should the District Court's denial of Plaintiffs' Motion for a New Trial be affirmed because: (1) No extraneous prejudicial information under Mont. R. Evid. 606(b) was presented to the jury during deliberations; and (2) Plaintiff did not suffer any actual or potential prejudice due to alleged jury misconduct?

II. STATEMENT OF THE CASE

Derek Stebner and Stebner Real Estate Inc.(collectively "Stebner") filed this action alleging that Associated Materials, Inc. d/b/a Alside (Alside), breached its manufacturer's warranty provided with siding that was installed on the Riverside Apartments owned by Stebner. The case was tried to a jury. After hearing the evidence and deliberating, the jury returned an 11-1 verdict finding that Alside did not breach its warranty.

Stebner brought a Rule 59 Motion for a New Trial alleging juror misconduct under Mont. Code Ann. § 25-11-102(2). *See* Pl.'s Mot. and Br. in Support of a New Tr. under Rule 59 (Sept. 21, 2009) Exhibit D to Appellants' Brief. Stebner specifically asserted that: (1) outside resources were used during deliberations; (2) jurors discussed the case prior to the submission of evidence and outside the courtroom; (3) the jury did not review the evidence during deliberations; and (4) one of the jurors expressed too strong of an

opinion during deliberations. Stebner's motion was supported by a single juror affidavit, that of the lone dissenting juror.

Alside filed a brief opposing Stebner's Motion For New Trial. *See* Def.'s Resp. to Pl.'s Mot. for a New Tr. (Oct. 1, 2009) attached as **Exhibit 1**. Alside supported its brief by affidavits from three other jurors. The facts attested to by these jurors clearly demonstrated that Stebner's Motion for New Trial lacked merit. The juror affidavits showed that the alleged statement of Juror No. 2 regarding the definition of "preponderance" occurred after the jury took its final 11-1 vote in favor of Alside. Even though Juror No. 2 admitted that she looked up the definition of "preponderance," on the Internet, her statement after the final 11-1 vote was based on her own understanding of "preponderance," not extraneous material. Lastly, Juror No. 2's statement regarding the definition of "preponderance" did not alter the definition provided in the jury instructions.

The District Court denied Stebner's Motion for a New Trial based on this Court's decision in *Erickson v. Perret*, 175 Mont. 87, 572 P.2d 518 (1977). *See* Or. (Oct. 27, 2009) attached as **Exhibit 2**. The Court correctly concluded that the jury misconduct alleged by Stebner did not affect a material matter in

dispute and did not prejudice Stebner so as to warrant the granting of a new trial under *Erickson*. *Id.* at 1.

Stebner subsequently brought this appeal based on the erroneous assertion that “one juror introduced an online definition of “preponderance” to the Jury, which the juror had researched outside of the jury room, and the Jury subsequently moved from a 6-6 deadlock to a 11-1 verdict in favor of Alside.” Appellant’s Br. at 1. The record clearly shows that any mention of an online definition of “preponderance” occurred after the jury took its 11-1 vote in favor of Alside. Thus, Stebner cannot show any actual or potential prejudice to warrant overturning the jury’s verdict in this case.

III. STATEMENT OF FACTS

This case was tried in the Montana Fourth Judicial District Court, the Honorable Ed McLean presiding, from September 15, 2009 to September 18, 2009. By way of Special Verdict Form, the jury determined that Alside did not breach its warranty. *See* Special Verdict Form (Sept. 18, 2009) attached as **Exhibit 3**, and Judgment Upon Jury Verdict (Oct. 27, 2009) attached as **Exhibit 4**. The vote was 11 - 1 in favor of Alside. Christine Strukel was the lone dissenter. Aff. Christine Strukel ¶ 9. (Sept. 18, 2009) Appellants’ Br. Ex. B. *See also* Aff. Laurie Schneider ¶ 3 (Sept. 25, 2009); Aff. Wayne Momsen ¶

3 (Sept. 29, 2009); Aff. Lisa Hofman ¶ 3 (Sept. 25, 2009) all attached as **Exhibit 5**.

The jury took no further votes after the 11-1 vote in favor of Alside. Affs. Schneider, Momsen, and Hofman ¶ 3. After the jury took its final 11-1 vote, Juror No. 2, Laurie Schneider, commented that she thought the verdict was correct based on her understanding of “preponderance.” Affs. Schneider, Momsen, and Hofman ¶ 4. Schneider previously looked up the word “preponderance” on the internet. Aff. Schneider ¶ 4. Schneider’s understanding of the word “preponderance” matched the definition of the submitted jury instruction. *Id.* See also Jury Instruction No. 3, attached as **Exhibit 6**. Schneider did not make any comment to the jury regarding “preponderance” until after the jury voted 11-1 in favor of Alside. Affs. Schneider, Momsen and Hofman ¶ 4. Schneider voted the way she did because the evidence submitted at trial did not support a verdict in favor of the Plaintiffs. Aff. Schneider, ¶ 5.

Stebner’s appellate brief strays far afield from the facts in the record, and relies solely on the conclusory allegations set forth in Strukel’s affidavit. An example appears on page 10 of the brief, which cites paragraph 8 of Strukel’s affidavit for the proposition that “... during the course of deliberations, an issue

regarding the definition of the term “Preponderance” as used in the Special Verdict Form was raised by the Jury. Rather than seek clarification through the Court, the Jury looked to a member with knowledge of the English Language for a definition.” Another example is found on page 11 of the brief, which cites paragraph 8 of Strukel’s affidavit for the proposition that “... the jury used an outside resource to help determine the definition of the term ‘preponderance’.”

Paragraph 8 of Strukel’s affidavit states that: “[d]uring the course of deliberations, the jury used an outside resource to help determine the definition of the term ‘preponderance’.” The affidavit fails to lay any foundation to support this conclusory allegation. The affidavit does not say what type of outside resource was used by the jury. It does not say which member or members of the jury allegedly used an outside resource. It does not explain how the outside resource was used. Neither does it explain how the outside resource helped determine the definition of “preponderance.”

There are no facts in the record to support the allegation in Stebner’s brief that an issue regarding the definition of “preponderance” arose during deliberations. Nor are there any facts in the record suggesting that the jury looked to a member with knowledge of the English language for a definition.

The affidavits of Schneider, Momsen and Hofman establish that Schneider's comment that she thought the verdict was correct based on her understanding of "preponderance" took place after the final after the 11-1 vote in favor of Alside. The affidavits of Momsen and Hofman establish that the comment had no effect on the decisions of other jurors. Affs. Momsen and Hofman ¶ 4. Jurors Momsen and Hofman based their decision on the evidence presented during the trial and their review of the evidence during deliberations. Affs. Momsen and Hofman ¶ 2 Jurors, Momsen and Hofman voted for Alside because the evidence that was submitted during trial did not support a verdict in favor of Stebner. Affs. Momsen and Hofman ¶ 6.

The other assertion in Strukel's affidavit on which Stebner primarily relies for this appeal is the statement in paragraph 1 that Strukel witnessed other jurors discussing the facts of the case outside the courtroom. Once again the affidavit fails to lay any foundation in support of this conclusory allegation. No attempt was made to describe what was said, or by which jurors, or even what facts were discussed. Schneider, Momsen and Hofman deny that members of the jury discussed facts of the case outside the jury room. Affs. Schneider, Momsen and Hofman ¶ 1.

IV. STANDARD OF REVIEW

When the basis of a motion for a new trial is alleged jury misconduct, this Court will not disturb a district court's decision absent a manifest abuse of discretion. *Fish v. Harris*, 2008 MT 302, ¶ 8, 345 Mont. 527, 192 P.3d 238 (citation omitted). A "manifest" abuse of discretion is one that is obvious, evident or unmistakable. *Shammel v. Canyon Resource, Corp.*, 2003 MT 379, ¶ 12, 319 Mont. 132, 82 P.3d 912. Under a plain abuse of discretion standard, the district court's discretion will not be disturbed unless there is a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *Shackleton v. Neil*, 207 Mont. 96, 101, 672 P.2d 1112, 1115 (1983).

V. ARGUMENT

A. Summary of the Argument

The district court's denial of Plaintiffs' Motion for a New Trial must be affirmed. The record in this case conclusively establishes that no extraneous prejudicial information was presented to the jury. Under Mont. R. Evid. 606(b), the internal influences of a jury cannot be used to impeach a jury verdict. Stebner misstates critical facts regarding the alleged juror misconduct. Even though Schneider did use the internet to look up the definition of

“preponderance,” it is uncontroverted that: (1) no print-out or external source was physically brought into the jury room; (2) Schneider’s comments were based on her own subjective understanding of the term “preponderance;” and (3) the definition of “preponderance” which Schneider found on the internet did not alter the definition provided in the jury instructions. As such, no extraneous prejudicial information was presented to the jury.

Second, Stebner has failed to show actual or potential prejudice that would warrant a new trial. Contrary to Stebner’s recitation of the facts, Schneider did not comment regarding her understanding of the term “preponderance” until *after* the jury voted 11-1 in favor of Alside. The internet definition of “preponderance” matched the definition provided in the jury instructions. Schneider’s comment had no effect on the decisions of the other jurors. Stebner cannot show any actual nor potential prejudice to warrant reversing the District Court’s denial of his motion for new trial. Therefore, the District Court must be affirmed in this case.

B. The District Court Did Not Manifestly Abuse Its Discretion.

Rule 59(a) of the Montana Rules of Civil Procedure provides that “[a] new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana.”

Stebner cites Mont. Code Ann. § 25-11-102(2) as the basis for the present appeal. Mont. Code Ann. § 25-11-102(2) provides in pertinent part:

The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes *materially affecting the substantial rights* of such party:

* * *

(2) misconduct of the jury. Whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

(Emphasis added).

When the basis of a motion for a new trial is alleged jury misconduct, this Court will not disturb a district court's decision absent a manifest abuse of discretion. *Fish v. Harris* at ¶ 8 (citation omitted). This Court "will give considerable weight to the determination of the district court because it is in the best position to observe the jurors and determine the potential for prejudice when allegations of jury misconduct are raised, and the district court is properly vested with significant latitude when ruling on these matters."

McGillen v. Plum Creek Timber Co. 1998 MT 193, ¶ 15, 290 Mont. 264, 964 P.2d 18 (citation omitted).

The ruling of the district court on a motion for a new trial is not to be lightly disturbed. *Schmoyer v. Bourdeau*, 148 Mont. 340, 343, 420 P.2d 316, 317 (1966).

Once the District Court has considered the matter, however it is raised, whether on a question of mistrial or motion for a new trial this court will not lightly disturb that ruling. To overthrow it this court must be shown by evidence that is **clear, convincing, and practically free from doubt**, of the error of the trial court's ruling.

Id. at 343, 420 P.2d at 317-318 (emphasis added).

Not every act of jury misconduct mandates a new trial. *Erickson v. Perrett*, 175 Mont. 87, 91, 572 P.2d 518, 520 (1977) (citations omitted). “The alleged jury misconduct must affect a material matter that is in dispute and must prejudice the complaining party.” *Id.*, 572 P.2d at 520. When the affidavits presented to the trial court indicate that the irregularity was not on a material matter in dispute and the plaintiff was not prejudiced, the motion should be denied. *Schmoyer* at 343-344, 465 P.2d at 318.

The evidence in the record clearly supports the District Court's denial of Stebner's Motion for a New Trial. Stebner has not produced evidence that is “clear, convincing, and practically free from doubt” of alleged error on the part of the District Court. Because the District Court did not manifestly abuse its

discretion by denying Stebner a new trial, the District Court should be affirmed.

C. The Jury Was Not Exposed to Extraneous Prejudicial Information, and Stebner Was Not Prejudiced in Any Manner.

Montana Rule of Evidence 606(b) clearly forbids evidence of the internal influences on the jury from being considered to impeach a jury's verdict. Schneider's comment regarding her understanding of the definition of "preponderance" was made in the jury room. There were no external sources of information in the jury room. Schneider's comment was her own understanding of the term "preponderance." The comment coincided with the definition of "preponderance" given by the Court in Jury Instruction No. 3. Thus, no extraneous prejudicial information was presented to the jury.

Schneider's comment did not actually or potentially prejudice Stebner. *Erickson* at 91, 572 P.2d at 520. The comment was made after the jury took its final 11-1 vote in favor of Alside. Deliberations were over. Lastly, the definition that Schneider found on the internet was the same as that set forth in Jury Instruction No. 3. Stebner has not made a showing of any prejudice to

warrant overturning the jury's verdict and the District Court's subsequent denial of Stebner's Motion for a New Trial.

1. No *Extraneous Prejudicial* Information Was Presented to the Jury.

Evidence regarding the internal influences on the jury is not admissible to impeach a jury's verdict. Mont. R. Evid. 606(b). The allegations of Christine Strukel's affidavit involving the internal influences on the jury must not be considered. *Harry v. Elderkin*, 196 Mont. 1, 8, 637 P.2d 809, 813 (1981). All of the allegations of Strukel's affidavit with the exception of paragraphs 1 & 7 are allegations regarding the internal influences of the jury's deliberations. Accordingly, none of the allegations regarding the internal jury deliberations may be considered in this appeal.

Two equally basic rights of a jury trial collide here. The first is the right to have a fair and impartial trial, free from misconduct of the jury in material matters. . . The second is the right to have a jury deliberate in camera, free and secure from frivolous and recurrent invasions of that privacy by disappointed litigants.

Schmoyer at 342, 420 P.2d at 317 (citations omitted). "Jury misconduct as a ground for new trial may be shown by juror affidavit according to section 25-11-102(2), MCA. Montana law on the use of juror testimony and affidavits upon an inquiry into the validity of a verdict is concisely summarized by Rule

606(b), Montana Rules of Evidence.” *Harry* at 7, 637 P.2d at 812-813. Mont.

R. Evid. 606(b) provides in full:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror’s mental process in connection therewith. Nor may a juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

However, as an exception to this subdivision, a juror may testify and an affidavit or evidence of any kind be received as to any matter or statement concerning only the following questions, whether occurring during the course of the jury’s deliberations or not: (1) whether extraneous prejudicial information was improperly brought to the jury’s attention; or (2) whether any outside influence was brought to bear upon any juror; or (3) whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance.

The cases on the use of juror affidavits fall into two major categories: (1) those involving external influence on the jury, and (2) those involving internal influence on the jury. *Harry* at 7-8, 637 P.2d at 813. Juror affidavits may not be used to impeach the verdict based upon internal influences on the jury, such as a mistake of evidence or misapprehension of law. *Id.* at 8, 637 P.2d at 813 (district court abused its discretion in granting a new trial based on juror

affidavit which reflected belief that jury did not understand instructions on contributory negligence, comparative negligence, and mitigation of damages). See also *Geiger v. Sherrodd, Inc.*, 262 Mont. 505, 510-511, 866 P.2d 1106, 1109 (1993) (jurors' disregard of district court's admonition to refrain from discussing workers' compensation insurance was an internal influence insufficient to grant new trial).

“Knowledge and information shared from one juror to another or others is not an extraneous influence.” *McGillen* at ¶ 21; *State v. Kelman*, 276 Mont. 253, 262, 915 P.2d 854, 860 (1996); *Williams Feed, Inc. v. Dept. of Transp.*, 2007 MT 79, ¶ 28, 336 Mont. 493, 155 P.3d 1228 (overruled on other grounds). “Jurors are expected to bring to the courtroom their own knowledge and experience to aid in their resolution of the case.” *Kelman* at 262, 915 P.2d at 860 (citation omitted).

In *McGillen*, a juror made a comment to the other jurors based on his personal knowledge of one of the plaintiff's witnesses. *McGillen* at ¶ 16. The defendant moved for a mistrial based on jury misconduct. *Id.* at ¶ 17. The defendant's motion was supported by affidavits of two jurors. *Id.* The district court denied the defendant's motion for three reasons. *Id.* at ¶ 19. First, the court determined that the information was not relevant to the issues before the

jury. *Id.* Second, the court found that the juror affidavits set forth internal rather than external influences on the jury. *Id.* Third, the court noted that the jury took its final 8-4 vote prior to the juror's comment and the defendant was therefore not prejudiced by the comment. *Id.*

This Court agreed that the juror's comment was an internal, rather than external influence on the jury's verdict. *Id.* at ¶ 20. Specifically, this Court said "[t]he affidavits submitted by McGillen do not show that the jurors were influenced or prejudiced by [the juror] in reaching their decision." *Id.* at ¶ 24.

Similarly, in *Kelman*, one of the jurors stated that she believed the defendant (Kelman) owned the Playground Bar in Great Falls, Montana. *Kelman* at 261, 915 P.2d at 859. Kelman argued that the statement was prejudicial extraneous information because the Playground Bar was a strip bar with a bad reputation and the comment was made to make him look bad. *Id.*, 915 P.2d at 859. Kelman's motion for a new trial was denied; however, the district court considered the affidavit that was submitted to impeach the verdict. *Id.* at 261-262, 915 P.2d at 859-860. Upon review, this Court upheld the district court's denial of a new trial, but found that the statement at issue was an internal influence on the jury of which the district court should not have considered in its ruling. *Id.* at 262-263, 915 P.2d at 860. This Court found that

the statement was the *juror's belief* that Kelman owned the Playground Bar and whether mistaken or not, its was an internal influence within the prohibition of Mont. R. of Evid. 606(b). *Id.* at 262, 915 P.2d at 860.

Lastly, a juror's report of observations he made while on a lunch break during trial regarding a significant factual issue were held to be an internal influence on the jury and not a proper subject for affidavits under Mont. R. Evid. 606(b). *Williams Feed* at ¶ 25. At issue in *Williams Feed* was whether plaintiffs had been denied reasonable access for their business due to the installation of curbs by the Department of Transportation. *Id.* at ¶¶ 8-9. The jury determined that plaintiffs were not denied reasonable access to their business. *Id.* at ¶ 16. After a lunch break, one of the jurors observed a truck accessing Standard Lumber, another business, in the same area as the plaintiff's business. *Id.* at ¶ 25. During deliberations, the juror told the other jurors that, "[s]ince trucks servicing Standard Lumber had no trouble in doing so, the same should apply to Williams Feed . . . " *Id.* Plaintiffs, Williams Feed moved for a new trial based on jury misconduct alleging that the juror had performed an independent investigation. *Id.* at ¶ 16. The Department obtained affidavits from the juror who made the statement and from other jurors. *Id.* at ¶ 25. The other jurors stated that the statement had been made late in the deliberations,

and that one vote of 9-3 in favor of the Department had already been taken. *Id.* The other jurors did not believe the comment had any additional influence on any of the other jurors. *Id.* The district court denied plaintiff's motion for a new trial. *Id.* at ¶ 16.

Upon review, this Court determined that the juror's statement amounted to "one juror sharing information with other jurors," and that, "[s]uch sharing of information does not constitute an external influence on the jury under Mont. R. Evid. 606(b)." *Id.* at ¶ 30. Specifically, this Court stated, "[w]e conclude that the information that [the juror] relayed to the jury derived, not from an independent investigation, but from a casual and perhaps mistaken observation." *Id.*

In the case at bar, as in *McGillen, Kelman* and *Williams Feed*, no extraneous prejudicial information was presented to the jury. The supposed extraneous information regarding the definition of "preponderance" came subjectively from one of the jurors based on her "knowledge and experience." *Aff. Schneider* ¶ 4. There was no outside source of information available to the jurors in the jury room. *Schneider* did not bring excerpts or printouts of definitions into the jury room to share with the other jurors. The Court's Instruction No. 3 defining "preponderance of the evidence" was not altered by

Schneider's comment, or any extraneous material. *Id.* at ¶ 4. Because no information was presented that contradicted the jury instructions, Stebner cannot claim that extraneous prejudicial information was submitted to the jury. The jury members based their decision on the evidence that was submitted at trial. *See Affs. Schneider, Hofman, and Momsen*, ¶ 2.

A juror's "knowledge of the English Language" is not extraneous information. A juror's knowledge is intrinsic to the juror. Jurors are expected to make decisions based on their particular "knowledge and experiences." Allowing jurors to express their opinions and personal experiences during their deliberations is the basic premise a jury trial is built upon.

As in *McGillen, Kelman, and Williams Feed*, the statement at issue in this case is simply "knowledge and information shared from one juror to another." A juror's statement of her subjective understanding of "preponderance" is nothing more than the "juror's belief." Anything a juror says based on his or her "knowledge and experience" in the course of deliberations, whether mistaken or not, is an internal influence within the prohibition of Mont. R. of Evid 606(b). In this case, Schneider's comment that she thought the verdict was correct based on her understanding of "preponderance" (which matched the definition provided in Jury Instruction

No. 3), was not an extraneous influence on the jury. Because the internet definition matched the definition provided by the jury instruction, there was no “extraneous” material considered by the jury.

This Court’s jurisprudence provides examples of cases involving extraneous prejudicial information. These include “a juror’s telephone call to obtain information with regard to previous litigation involving a plaintiff, visiting the scene of an accident and reporting findings to fellow jurors, or bringing a newspaper article into the jury room and showing it to jury members. *Kelman*. at 262, 915 P.2d at 860. Contrary to these examples, nothing extraneous was actually brought to the jury room by Schneider.

Stebner cites *Allers v. Riley*, 273 Mont. 1, 901 P.2d 600 (1995) and *Brockie v. Omo Constr.*, 255 Mont. 495, 844 P.2d 61 (1992) as analogous to the case at bar; however, those two cases are easily distinguished on their facts. In *Allers*, counsel learned that during the jury deliberations, the jury foreperson requested the bailiff to provide them a dictionary to use in the jury room, and that the bailiff complied with the request. *Allers*, 273 Mont. at 2-3, 901 P.2d at 601. The jury used the dictionary to look up the terms “proximate cause” and “prudent.” *Id.*, 901 P.2d at 601. The dictionary definitions did not contain the element of foreseeability which was contained in the jury instruction. *Id.*, 901

P.2d at 601. This Court found that the jury had *redefined* causation by eliminating the foreseeability element. *Id.* at 9, 901 P.2d at 604.

In *Brockie*, Omo presented expert testimony regarding a theory of kinematics and motion theory in relation to the location of a flasher board at the time of impact. *Brockie*, 255 Mont. 495, 500, 844 P.2d 61, 64 (1993). The location of the flasher board was a critical piece of evidence. *Id.*, 844 P.2d at 64. One of the jurors went to the library to research the theory of kinematics and motion theory to clarify the expert testimony. *Id.*, 844 P.2d at 64. The Court found that the statements by the juror in the jury room relative to the placement and position of the sign, in effect, made the juror a supporting witness as to the expert testimony presented. *Id.*, 844 P.2d at 64-65.

Allers and *Brockie* are readily distinguishable from the present case. In *Allers*, the jury requested and received a dictionary in the jury room to look up a critical legal term that was defined in the court's instruction to the jury, and the dictionary definition differed from the court's instruction. The dictionary was physically present during jury deliberations. The definitions provided by a dictionary are concrete and irrefutable. Jurors will be inclined to take a dictionary definition at face value when the source is right in front of them.

The dictionary definition actually redefined the definition of causation submitted with the jury instructions.

In contrast to *Allers*, in the present case there was no external source of information in the jury room for the jury to consider. Schneider's comment was based on her own understanding of "preponderance." Her comment did not redefine the definition of "preponderance" as given in Jury Instruction No. 3. Her opinion regarding "preponderance" was subject to the scrutiny of the other jurors, the same as any other comment made in the jury room.

The facts in the present case are also very different from the facts of *Brockie*. In *Brockie*, the juror independently confirmed disputed, factual, expert testimony. During deliberations, and before the jury rendered its final vote, the juror acted as a witness to bolster the expert's testimony regarding the central factual issue in the case. In the case at bar, Schneider's comment was not made until after deliberations had ceased. All factual issues had been decided by the jury. Schneider simply stated her subjective understanding of the term "preponderance." There was no independent investigation of pivotal facts in the case. Schneider's comment did not bolster any of the disputed factual testimony presented during trial. Her research and comment regarding

“preponderance” did not add anything to the jury deliberations. The facts of *Brockie* are not analogous to the current case.

No extraneous prejudicial information as defined by Montana law was brought to the attention of the jurors. The allegations contained in Christine Strukel’s affidavit relating to the internal influences on the jury, and the misstated facts of Stebner’s brief should not be considered to impeach the jury’s verdict in this case.

2. Even If this Court Determines That Extraneous Prejudicial Information Was Presented to the Jury, Stebner’s Substantial Rights Were Not Prejudiced.

To the extent juror affidavits are considered in this Court’s ruling, the facts attested to by the jurors show that Stebner was not prejudiced to any degree. A motion for a new trial must state with particularity the grounds therefore. Mont. R. Civ. P. 59(a). Christine Strukel’s affidavit and Stebner’s brief do not set forth facts sufficient to warrant reversal of the District Court. Montana case law provides many examples of alleged jury misconduct much more likely to produce prejudice, which did not warrant a new trial, than what has been alleged in the current case.

**A. Stebner Was Not Prejudiced Because Schneider's
Comment Did Not Affect the Jury's 11-1 Verdict.**

The alleged jury misconduct in this case did not affect a material matter in dispute. *Erickson v. Perret*, 175 Mont. at 91, 572 P.2d at 520. In *Erickson*, on the last day of trial, several of the jurors inadvertently saw defendant's car during the noon recess. There was conflicting evidence as to the amount of damage done to the defendant's car regarding the severity of the impact. *Id.* Affidavits were submitted by jurors in support of the verdict. *Id.* at 92, 572 P.2d at 520. Specifically, "jurors swore that no juror provided any new or different information concerning the car." *Id.* at 92, 572 P.2d at 520. On review, this Court found that the alleged misconduct did not prejudice the complaining party. *Id.* at 92, 572 P.2d at 520.

In *Schmoyer v. Bourdeau*, a juror, after the case was submitted and during deliberations, told the other jurors that she had telephoned one of her relatives concerning prior litigation of the plaintiff. *Schmoyer* at 341, 420 P.2d at 316-317. The relative told the juror that the plaintiff had sued his own son in the past, and added the statement that "anyone who would sue his own son was not entitled to any verdict." *Id.*, 420 P.2d at 317. The district court denied plaintiff's motion for a new trial. *Id.* at 341, 420 P.2d at 316. This Court found

that “the affidavits presented to the trial court indicate that the irregularity was not on a material matter in dispute and that the plaintiff was probably not prejudiced.” *Id.* at 343-344, 420 P.2d at 318.

The acts of jury misconduct at issue in *Erickson* and *Schmoyer* would tend to prejudice the complaining party much more than the alleged jury misconduct in the present case. The instances of misconduct in *Eriskson* and *Schmoyer* actually added information to the jury deliberation that was not offered at trial. In the case at bar, the jury was not subjected to any new information via Schneider’s comment regarding “preponderance.” The definition she found on the internet was the same as that provided by the jury instruction. There was no “matter in dispute.” As in *Erickson*, other jurors have sworn that Schneider’s comment did not affect their decision in this case. *See Affs. Hofman and Momsen* ¶ 5. To the extent that juror affidavits are considered in this case to be probative of the jury’s verdict, the affidavits show that Stebner was not prejudiced in any manner.

B. Stebner Cannot Claim Prejudice When Schneider’s Comment Was Made After the Jury’s Final 11-1 Vote.

In *McGillen v. Plum Creek Timber Co.*, the district court based its decision to deny a motion for new trial in part because, “the court noted that the

jury took a vote prior to [the juror's] comment which was 8-4 in favor of [defendant]. When the verdict was announced, this vote was not changed as a result of the shared information.” *McGillen* at ¶ 19. See also *Williams Feed* at ¶ 25 (where comment was made after 9-3 vote and did not influence other jurors).

Like the situation in *McGillen*, Schneider did not speak to the jury regarding her understanding of “preponderance” until after the Jury voted 11-1 in favor of Alside. No further votes were taken. Deliberations were over. The jurors were not affected by Schneider’s comment. The jurors reviewed the available evidence and rendered their verdict based on the evidence and jury instructions.

The affidavit submitted by Stebner fails to controvert the fact that the alleged extraneous information was not submitted to the jury until after the jury voted 11-1 in favor of Alside. Stebner cannot possibly be prejudiced when the final jury vote had already been taken.

C. Not Every Act of Jury Misconduct Mandates a New Trial.

Even when a juror’s actions violate the instructions given by the court at the start of trial, the moving party must demonstrate sufficient prejudice to

support a motion for a new trial. *State v. Murray*, 228 Mont. 125, 129-130, 741 P.2d 759, 762 (1987). In *State v. Murray*, a criminal prosecution, one juror went to the local office of state Social and Rehabilitative Services (SRS) when SRS was peripherally involved in the trial. *Id.* at 128-129, 741 P.2d at 761. One of the other jurors made several phone calls to a county attorney who had assisted with the prosecution of the defendant. *Id.* at 129, 741 P.2d at 761. At first, the county attorney refused to talk with the juror because the juror did not identify who she was. However, the juror persisted. On her third call to the attorney, the juror left a message regarding a newspaper article's description of criminal trials involving sexual abuse. *Id.* at 129, 741 P.2d at 761-762. The county attorney returned the juror's call and discussed the admissibility of evidence of sexual abuse with the juror. *Id.*, 741 P.2d at 762. The newspaper article the juror referenced talked of sexual abuse of children in general terms and quoted several people, including one of the prosecutors of the case. *Id.*, 741 P.2d at 762.

The defense moved for a mistrial based on jury misconduct, and the district court denied the motion. *Id.*, 741 P.2d at 762. This Court upheld the district court's ruling because there was sufficient evidence to rebut any

presumption of prejudice, and there was no clear and convincing evidence of any error of the district court's ruling. *Id.* at 130, 741 P.2d at 762.

In the present case, as in *Murray*, there is sufficient evidence to rebut any presumption of prejudice. The allegations set forth in Stebner's brief do not even come close to the level of alleged misconduct demonstrated in the cases of *Erickson*, *Schmoyer* and *Murray*. Accordingly, the District Court's denial of Appellants' Motion for a New Trial must be affirmed.

i. Unsupported Allegations That Jurors Were Discussing the Case Outside of Deliberations Does Not Rise to the Level of Prejudice Required to Grant a New Trial.

A motion for a new trial must state with particularity the grounds therefore. Mont. R. Civ. P. Rule 59(a). Mere allegations by Strukel that she witnessed other jurors discussing the facts of the case outside the courtroom, or that she observed jurors speaking with each other outside the court room does not warrant a new trial. Stebner must make a showing of particular sworn facts that show his rights were prejudiced.

Even if jurors were discussing facts of the case, Stebner has shown no prejudice that would warrant a new trial. The out-of-court communications at issue in *Murray* and *Schmoyer* were alleged with particularity and would

certainly prejudice the complaining party much more than any of the allegations in Strukel's affidavit. In *Murray*, a criminal case, the juror hid her identity to speak with one of the prosecuting attorneys regarding the introduction of evidence of sexual abuse at trial when sexual abuse was an issue at the trial. In *Schmoyer*, the juror called a relative, received derogatory information about the plaintiff, and then proceeded to report the information to the rest of the jury. The out-of-court communications demonstrated in *Murray* and *Schmoyer* were particularized and had much more potential to create prejudice than the generalized allegations of Strukel's affidavit.

Strukel's allegation that jurors were speaking amongst themselves outside of the courtroom without any factual support regarding what the jurors were talking about simply does not show that Stebner was prejudiced or suffered any actual or potential injury.

ii. Expressing an Opinion for or Against a Particular Verdict During Deliberations Is Not Jury Misconduct.

As stated in *Kelman*, “[k]nowledge and information shared from one juror to another or others is not an extraneous influence.” *Kelman*, 276 Mont. at 262, 915 P.2d at 860. “Jurors are expected to bring to the courtroom their own knowledge and experience to aid in their resolution of the case.” *Id.*, 915

P.2d at 860. Remarks from one juror to another that relate solely to the juror's thoughts about the evidence presented do not constitute an external influence on the jury. *State Compen. Mut. Ins. Fund v. Berg*, 279 Mont. 161, 171, 927 P.2d 975, 981 (1996) (where it was an internal influence when juror commented during recess to another juror, "[t]hat's the one we'll have to convince.").

Expressing opinions regarding the trial is what a jury is supposed to do during deliberations. If a juror disagrees with another juror's opinion, it is that juror's duty to make their decision based on their own opinion. In this case, the jurors made their decisions based on the evidence that was submitted to them.

Furthermore, as discussed above, information regarding internal jury deliberation is not admissible under Mont. R. Evid. 606(b) when considering a motion for a new trial.

iii. A Short Deliberation Period Does Not Amount to Jury Misconduct.

Strukel's allegation that none of the jurors reviewed the submitted evidence during deliberations is inaccurate. The affidavits of Schneider, Hofman and Momsen state that they reviewed the evidence during deliberations and based their decisions on the evidence.

A short deliberation period is not grounds for a new trial. *State v. Seaman*, 236 Mont. 466, 476-477, 771 P.2d 950, 956 (1989). In *State v. Seaman*, the jury deliberated for only 25 minutes before delivering its verdict. *Id.* at 476, 771 P.2d at 956. On appeal, the defendant alleged the fact that the jury took so little time in reaching a verdict demonstrates they failed to consider or read the instructions, consider the evidence, or follow their charge. *Id.*, 771 P.2d at 956. This Court found that substantial evidence supported the verdict, and there was no error of law in the record. This Court rejected the argument that the jury spent too little time considering the law and facts in the case. *Id.* at 476-477, 771 P.2d at 956.

In this case, the jurors reviewed the evidence during deliberations and based their decisions on that evidence. The jurors deliberated for over 1.5 hours. This was a simple case. The jurors were asked to decide whether there was a breach of warranty or not. The evidence and testimony at trial clearly supported the jury's verdict.

In any event, as discussed above, Mont. R. of Evid. 606 precludes admissibility of information regarding the internal deliberations of the jurors to impeach the jury's verdict. Therefore, the District Court's denial of Appellants' Motion For a New Trial must be affirmed.

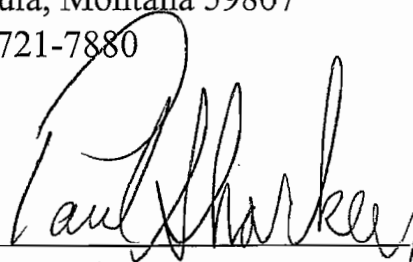
VI. CONCLUSION

Stebner has not produced a shred of evidence, let alone clear and convincing evidence that is practically free from doubt, to demonstrate that the District Court manifestly abused its discretion in denying his motion for new trial. The facts in the record plainly and clearly show that the jury was not exposed to any extraneous prejudicial information. Stebner likewise has made no showing that he has suffered actual or even potential prejudice. Therefore, the District Court's denial of Stebner's Motion for a New Trial must be affirmed.

DATED this 13th day of April, 2010.

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A handwritten signature in black ink, appearing to read "Paul Sharkey", written over a horizontal line.

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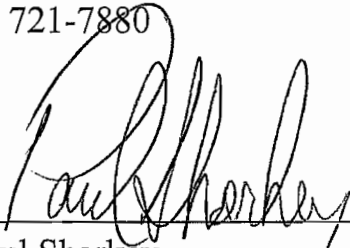
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Appellee's Brief* is printed with a proportionately spaced Times New Roman typeface of 14 points, is double spaced; and the word count calculated by Corel WordPerfect for Windows is 6771 words pursuant to Montana Rules of Appellate Procedure 11(4), not averaging more than 280 words per page, excluding Certificate of Compliance and Certificate of Service.

DATED this 13th day of April, 2010.

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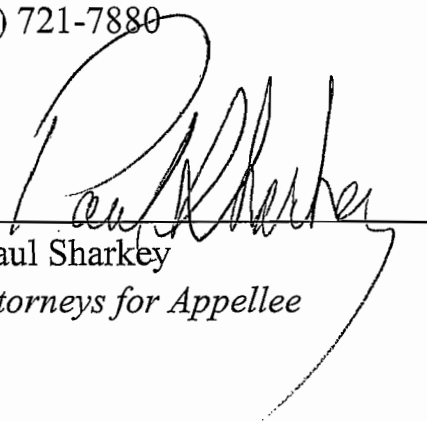
CERTIFICATE OF MAILING

I, Paul Sharkey, one of the attorneys for Appellee Associated Materials, Inc. in the above-entitled action, hereby certify that on the 13th day of April, 2010, I served the within *Appellee's Brief* upon the attorneys of record by mailing one copy thereof, to each party represented, in an envelope, securely sealed, postage prepaid and addressed as follows:

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